Supreme Court, U.S.
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No. 89-225

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

MARY ROSENTHAL, BERNARD L. MILLER, YETTA MILLER, and the ESTATES OF SAMUEL SCHWARTZ AND ANNA SCHWARTZ,

Petitioners,

v.

JEROME J. VERLIN, ESQUIRE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Question Presented for Review

Did the Supreme Court of Pennsylvania and the Superior Court of Pennsylvania err in dismissing Petitioners' Appeal from the grant of Summary Judgment for failure to comply with the Pennsylvania Rules of Appellate Procedure?

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Opinions Below

Judge Samuel Lehrer of the Philadelphia County Court of Common Pleas issued an Order and Opinion on January 20, 1988 granting Summary Judgment in favor of the respondent. The Opinion is reprinted in the Petition Appendix. The Superior Court of Pennsylvania issued an Order on May 25, 1988 dismissing the appeal from the Order granting Summary Judgment. That Order is reprinted in the Petition Appendix. The Superior Court denied the petitioners' motion for reconsideration on June 10, 1988. The Pennsylvania Supreme Court denied allowance of appeal on December 28. 1988. The Pennsylvania Supreme Court denied reconsideration on April 27, 1989. These Orders are reprinted in the Petition Appendix.

Statement of the Case

This case involves a civil claim alleging legal malpractice against the respondent filed in the Court of Common Pleas of Philadelphia County in the state of Pennsylvania. The original Complaint alleged that the respondent had improperly represented the petitioners in connection with a fire loss which occurred in 1963. The original Complaint alleged that the respondent was retained in 1974. As is set forth in the Opinion of Judge Lehrer of the Court of Common Pleas of Philadelphia County accompanying the Order of January 20, 1988, there were multiple other lawyers engaged by the Petitioners involving representation for the same loss over an extended period of time.

On January 20, 1988, Judge Lehrer granted a Motion for Summary Judgment filed by the respondent. Judge Lehrer held that there was no genuine issue of fact and that the claims were barred by the applicable statute of limitations; by reason of the doctrine of *res judicata;* and by reason of a Release executed by the

plaintiffs. No appeal was taken from that Order within 30 days as required by the Pa.R.App.P. 903.

By letter of February 19, 1988, petitioner enclosed a Petition for Reconsideration of the January 20, 1988 Order. Judge Lehrer denied the Petition for Reconsideration by Order of March 18, 1988 (Petition Appendix). On April 18, 1988 the petitioner filed a notice of appeal in the Pennsylvania Superior Court.

On May 3, 1988 respondent filed a Motion to Dismiss the Appeal for failure to comply with Pa.R.App.P. 903. On May 25, 1988, the Pennsylvania Superior Court entered an Order granting the Motion to Dismiss the Appeal (Petition Appendix). Petitioner filed a Petition for Reconsideration which was denied by the Pennsylvania Superior Court on June 10, 1988 (Petition Appendix). On July 11, 1988 petitioner filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania. On December 28, 1988 the Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal (Petition Appendix). Petitioner filed a Petition for Reconsideration in the Pennsylvania Supreme Court. The Pennsylvania Supreme Court denied the Petition for Reconsideration on April 27, 1989 (Petition Appendix).

Summary of Argument

The Petition for Writ of Certiorari should be denied because this case involves no special or important reasons for granting the petition. This matter involves the application of the Pennsylvania Rules of Appellate Procedure by the Pennsylvania Supreme and Superior Courts. There is no constitutional or federal question involved. There is no conflict with either a Federal Court or another State Court of the last resort by reason of the decision rendered by the Pennsylvania Supreme Court in this matter. This matter involves the simple and mechanical application of Rule 903 of the Pennsylvania

Rules of Appellate Procedure concerning the requirement of a timely filing of an appeal.

The original claim against the respondent was concluded by the entry of Summary Judgment in favor of the respondent. The petitioner did not file an appeal in a timely manner as required by Pa.R.App.P. 903. The Pennsylvania Superior Court dismissed the appeal for that reason. The Pennsylvania Supreme Court denied allowance of appeal from that Order.

Petitioner now seeks review by this Court. The petition is simply a repetition of scandalous, unsupported and unsupportable claims. There is no serious attempt to address the legal issues involved. Many quotations are fictitious and certainly not attributed. Indeed, the petitioner directly violates Rule 34.6 of the Rules of this Court prohibiting scandalous material.

Additionally, the petition is untimely. The Order of the Pennsylvania Supreme Court denying allowance of appeal is dated December 28, 1988. The petition was docketed in this Court on July 24, 1989.

Legal Argument

The legal issue involved here is whether the dismissal of the appeal by the Pennsylvania Superior Court and the subsequent affirmances of that decision (by reason of denial of the allowance of appeal) by the Pennsylvania Supreme Court was proper. Pursuant to Pa.R.App.P. 903 and the Pennsylvania Court decisions interpreting that Rule, there is no question but that the dismissal of the appeal was correct.

The Order granting Summary Judgment was dated January 20, 1988. Rule 903 requires the filing of an appeal within thirty (30) days of that date.

In *Leonard v. Andersen Corp.*, 300 Pa.Superior 22, 445 A.2d 1279 (1982), the Superior Court specifically addressed the issue of timely appeal and held that an appeal must be filed within 30 days from the original

Order granting Judgment in the case, and a Petition for Reconsideration will not extend that time. The Court stated

> "Timeliness of an appeal is a jurisdictional matter which can be raised by the Court *sua sponte* [citations omitted]. In general the 'notice of appeal . . . [must] be filed within 30 days after the entry of the Order from which the appeal is taken.' Pa.R.A.P. 903(a) . . . The 30 day appeal period of Rule 903 has been strictly construed. [citations omitted]. An Appellate Court 'may not enlarge the time for filing a notice of appeal' Pa.R.A.P. 105(b). The mere filing of a Petition for Reconsideration does not toll the period in which an appeal may be perfected." [citations omitted] 300 Pa.Superior at 25.

The rule of *Leonard v. Andersen* has been reaffirmed in *Hunter v. Employers Insurance of Wausau,* 347 Pa.Superior 227, 500 A.2d 490 (1985) and *Simpson v. Allstate Insurance Company,* 350 Pa.Superior 239, 504 A.2d 335 (1986)).

There is no issue of a conflict by reason of this decision with a decision of a Federal Appeals Court or another state court of last resort. Sup.Ct.R. 17. *See also, Bingler v. Johnson,* 394 U.S. 741, 747-48 (1969); *United Mine Workers of America v. Illinois State Bar,* 389 U.S. 217, 219 (1967). There is no federal question involved. *See Donaldson v. United States,* 400 U.S. 517, 522 (1971); *Department of Mental Hygiene of California v. Kirchner,* 380 U.S. 194, 197 (1965); *Howell v. Jones,* 516 F.2d 53, 56 (5th Cir. 1975), *cert. denied,* 424 U.S. 916 (1976). There is simply no reason to grant the Petition.

To the extent that the petitioner complains about the process of Summary Judgment without a jury trial, that argument is both foreclosed and incorrect. It is foreclosed because the petitioner never perfected the appeal properly. It is incorrect because the Pennsylvania

Rules specifically provide for the Summary Judgment procedure. See Pa.R.Civ.P. 1035. *See also, Bobb v. Kraybill,* 354 Pa.Super. 361, 364, 511 A.2d 1379, 1380 (1986), *allocatur denied,* 513 Pa. 633, 520 A.2d 1384 (1987); *Curry v. Thompson,* 332 Pa.Super. 364, 368, 481 A.2d 658, 659 (1984); *Bowman v. Sears, Roebuck & Co.,* 245 Pa.Super. 530, 535, 369 A.2d 754, 756 (1976); *Bremmer v. Protected Home Mutual Life Insurance Company,* 436 Pa. 494, 260 A.2d 785 (1970).

This Court has explained the favored use of Summary Judgment as a method of disposing of litigation. *Celotex v. Catrett,* 106 S.Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.,* 106 S.Ct. 2505 (1986).

Indeed, the mere reading of this Petition, with its fictitious and scandalous allegations, presents a strong argument that Summary Judgment was absolutely appropriate here.

Conclusion

None of the considerations governing review on certiorari exist in this case. Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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